

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Universal Service Contribution)	WC Docket No. 06-122
Methodology)	
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51

**COMMENTS
of
UNITED STATES CELLULAR CORPORATION**

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SUMMARY

U.S. Cellular welcomes this opportunity to participate in the Commission's rulemaking proceeding focusing on Universal Service Fund contribution reform. U.S. Cellular commends the Commission for its efforts in pursuing these reforms, which will have important consequences for the effective administration of the USF system and the utilization of the Fund to promote both wireline and mobile wireless broadband deployment throughout rural America.

U.S. Cellular's Comments, which focus on four main issues, are summarized in the following paragraphs.

EXPANDING THE CONTRIBUTION BASE

A critical component of the Commission's contribution reforms must be the adoption of rules and policies designed to expand the base of service providers obligated to make Fund contributions. The Commission has sufficient permissive authority under the Communications Act of 1934 to facilitate this expansion of the contribution base, and it must act effectively and expeditiously to do so because the ongoing sustainability of the Fund, as well as fairness and equity in the administration of the Fund, will be enhanced if the base of contributors is broadened.

Expansion of the contribution base is especially important for consumers of wireless services, because it is inequitable for wireless consumers to continue to fund the lion's share of the USF, while at the same time the Commission has acted to significantly reduce universal service funding for mobile wireless eligible telecommunications carriers. Contribution reforms that expand the contribution base can help to correct this imbalance, augmenting efforts by wireless carriers to bring 4G mobile broadband services to rural consumers.

U.S. Cellular advocates two key steps. First, broadband Internet access service should be made assessable. The urgency and correctness of this step are underscored by the Commission's recent decision to use the Fund to support the deployment and operation of broadband networks. Because dramatic growth in broadband services is expected to continue in the next several years, establishing contribution obligations for broadband service providers also would promote the sufficiency and sustainability of the Fund.

While the Commission notes in the *Further Notice* that some parties have expressed concern that making broadband assessable could adversely affect overall broadband adoption levels, U.S. Cellular urges the Commission to press ahead with contribution reforms that include the establishment of contribution obligations for broadband providers. Given the numerous advantages of including broadband in the contribution base, parties concerned with the impact of such a step on broadband adoption should bear the burden of demonstrating convincingly that such an action would adversely affect broadband adoption.

Since U.S. Cellular is dubious that such a case can be made, it suggests that the Commission should act now to include broadband in the base, and then reserve its option to reexamine this issue if any empirical evidence emerges supporting current theories that assessing broadband could depress adoption levels.

And, second, U.S. Cellular favors the use of a general definition of assessable information services and telecommunications as the best means of ensuring that the contribution base can be expanded quickly to include new services and technologies on a going-forward basis. The alternative of relying on a service-by-service list, which would need to be updated from time to time by formal Commission action, would be too cumbersome and would unnecessarily delay expansion of the contribution base.

In addition to these two key steps, U.S. Cellular also advocates that the Commission should use its permissive authority under the Act to make one-way Voice over Internet Protocol service subject to contribution assessments, and should also determine that several specified classes of enterprise communications services should be assessable.

REFORMING THE CONTRIBUTION METHODOLOGY

The Commission should retain its revenues-based contribution methodology, but should adopt reforms to improve and enhance the operation of this methodology. In U.S. Cellular's view, a revenues-based system best serves the interests of consumers because it is not regressive—customers who use less revenue-generating services pay a lower USF surcharge—and because it best reflects consumer choices in the marketplace for telecommunications and broadband services.

U.S. Cellular suggests two reforms that would enhance the operation of its revenues-based system. First, if the Commission makes broadband service assessable, then all broadband revenue should be assigned completely to the interstate jurisdiction. There is ample Commission precedent for such an allocation decision, and treating broadband revenue as 100% interstate would further the Commission's goal of ensuring the sufficiency and sustainability of the Fund.

And, second, the Commission should utilize a “safe harbor” test for determining the allocation of revenues from bundled services. A safe harbor test, which would give contributing carriers the option of ensuring that their contribution obligation is limited to revenues from their provision of assessable telecommunications, would be more equitable than a “bright-line” test that would require contributions to be made on revenues that are not assessable under the Act.

IMPROVING ADMINISTRATION OF THE CONTRIBUTION SYSTEM

U.S. Cellular is encouraged by the Commission's solicitation of comments on a wide array of issues concerning improvements in the administration of the contribution system. U.S. Cellular makes several suggestions in its Comments.

The Commission should provide that annual revisions to the procedures and requirements governing contribution reporting mechanisms should be made only after the Commission has conducted a notice-and-comment proceeding that gives interested parties an opportunity to address proposed revisions. U.S. Cellular also favors requiring the Universal Service Administrative Company to prepare an updated audit plan that reflects contribution reforms adopted by the Commission in this proceeding. Doing so would help maintain a fair system that ensures that all telecommunications providers play by the rules.

The Commission also should adopt rules to require all service providers, including non-carriers, to register with the Commission in a timely manner when they begin providing services, thus ensuring that they are brought within the USF contribution system. In addition, although U.S. Cellular favors the continuation of quarterly contribution factor revisions (instead of shifting to annual adjustments), it also advocates extending the period during which prior period adjustments may be made, as a means of helping to reduce volatile fluctuations in the contribution factor.

EXAMINING RULES FOR CARRIERS' RECOVERY OF CONTRIBUTION ASSESSMENTS

U.S. Cellular shares the Commission's objective that end-user consumers should benefit from transparent mechanisms for the flow-through of carriers' contribution assessments. Nonetheless, U.S. Cellular urges the Commission not to rush to any judgment that the current system is broken and must be fixed. Rules are already in place that protect the interests of end-user con-

sumers. Moreover, the adoption of new requirements—such as prohibiting Fund contributors from recovering contribution assessments from end users through a line-item or “surcharge” on end-user bills—would reduce carriers’ billing flexibility and could have unintended and unforeseen consequences regarding the range of services offered by Fund contributors and their ability to compete against non-contributing service providers.

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United States Cellular Corporation (“U.S. Cellular”), by counsel, hereby submits these Comments, pursuant to the Commission’s Further Notice of Proposed Rulemaking in the above-captioned proceeding.¹

U.S. Cellular provides cellular services and Personal Communications Service in 44 Metropolitan Statistical Areas, 100 Rural Service Areas, one Major Trading Area, and numerous Basic Trading Areas throughout the Nation. U.S. Cellular has received eligible telecommunications carrier (“ETC”) status and is currently receiving high-cost support for its operations in Illinois, Iowa, Kansas, Maine, Missouri, Nebraska, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Tennessee, Virginia, Washington, West Virginia, and Wisconsin. U.S. Cellular

¹ *Universal Service Contribution Methodology*, WC Docket No. 06-122, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Further Notice of Proposed Rulemaking, FCC 12-46 (rel. Apr. 30, 2012), 77 Fed. Reg. 33896 (June 7, 2012), 2012 WL 1524623 (“*Further Notice*”). Comments are due July 9, 2012. *Wireline Competition Bureau Announces Deadlines for Comments on Universal Service Contribution Methodology Further Notice of Proposed Rulemaking*, WC Docket No. 06-122, GN Docket No. 09-51, Public Notice, DA 12-905 (rel. June 7, 2012).

has been an active and ongoing participant in the Commission’s Connect America Fund (“CAF”), contribution reform, Intercarrier Compensation (“ICC”), Mobility Fund, and related rulemaking proceedings since their initiation by the Commission.

I. INTRODUCTION.

The Commission’s *Further Notice* is the latest chapter in the agency’s efforts aimed at “[r]eforming [its] rules [to] help further the statutory goals of ensuring . . . ‘equitable and non-discriminatory’ contributions such that support is ‘sufficient’ to meet the purposes of section 254 of the Act”²

U.S. Cellular has been a consistent supporter of contribution reform,³ and has argued that the Commission “should stop dealing with only one half of the universal service support equation—outgoing funds disbursed to [ETCs]—and start addressing the other half of the equation—incoming funds received from universal service contributors.”⁴ U.S. Cellular has explained that “[t]he Commission’s defense of its austerity budget, in which the goal appears to be to drive

² *Connect America Fund*, WC Docket No. 10-90, *A National Broadband Plan for Our Future*, GN Docket No. 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, *High-Cost Universal Service Support*, WC Docket No. 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service Reform – Mobility Fund*, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17738 (para. 194) (2011) (“*CAF Order*”), *pets. for review pending sub nom. Direct Commc’ns Cedar Valley, LLC v. FCC*, No. 11-9581 (10th Cir. filed Dec. 18, 2011) (and consolidated cases) (citing 47 U.S.C. §§ 254(b)(1), (b)(4)-(5), (d), (e)).

³ See, e.g., U.S. Cellular Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012 (“U.S. Cellular CAF Comments”) at 19-20 (explaining that the Commission could effectively solve the problem of ensuring that support is available to “fill in the holes” in the availability of mobile broadband services by “finally mov[ing] forward with universal service contribution reform”).

⁴ U.S. Cellular Reply Comments, WC Docket No. 10-90, *et al.*, filed Feb. 17, 2012 (“U.S. Cellular CAF Reply Comments”) at 3 (emphasis in original).

down the level of support as much as possible, rings hollow as the Commission fails to move forward with contribution reform.”⁵

U.S. Cellular therefore agrees with the concerns expressed by Commissioner McDowell at the time the *CAF Order* was adopted:

[D]espite all of the exhaustive efforts to get to this point, our work on comprehensive Universal Service reform is not even half finished. Equally important is the need to reform the contribution methodology, or how we are going to pay for all of this. It is no secret that for years I have been pushing for contribution reform to be carried out at the same time as distribution reform. Obviously, that is not happening today; therefore we must act quickly.⁶

Indeed, as U.S. Cellular has explained, “[t]he Commission’s inexplicable refusal to proceed with contribution reform lends a certain Alice in Wonderland quality to the [USF] budget dilemma”⁷ For example, the Commission decided in the *CAF Order* to limit annual funding for Mobility Fund Phase II to \$400 million,⁸ which amounts to approximately one-third of the funding available for mobile wireless deployment and operations in rural areas under the capped high-cost funding mechanism. In fact, the Commission has adopted “numerous devices to restrict the level of support (the single-winner, lowest-bid reverse auction mechanism being the prime example), it justifies these constraints by pointing to its ‘limited’ budget, and it refuses to take revenue-raising measures that would address these self-imposed limitations.”⁹

Against this backdrop, U.S. Cellular commends the Commission for its substantial efforts, amply reflected in the *Further Notice*, in raising the myriad issues that must be addressed

⁵ *Id.* at 3-4.

⁶ *CAF Order*, 26 FCC Rcd at 18407 (Statement of Commissioner Robert M. McDowell).

⁷ U.S. Cellular CAF Reply Comments at 14.

⁸ *CAF Order*, 26 FCC Rcd at 17711 (para. 126) (\$500 million per year is provided in support through the Mobility Fund, of which \$100 million is earmarked for Tribal lands).

⁹ U.S. Cellular CAF Reply Comments at 14 (footnotes omitted).

as part of the Commission's efforts to launch contribution reform and catch up with CAF and ICC rules that are now already in place. In the following sections, U.S. Cellular addresses a number of these issues raised in the *Further Notice*.

The Commission should exercise its permissive authority under Section 254(d) of the Communications Act of 1934 ("Act")¹⁰ to expand the contribution base, because doing so will distribute contribution obligations more equitably and will enhance the sustainability of the Universal Service Fund ("USF" or "Fund"). In particular, the contribution base should be expanded to cover fixed and mobile broadband Internet access services.

In addition, the Commission should adopt a general definition for purposes of determining whether new services and technologies are subject to Fund contribution obligations, because utilizing a definitional approach would be an effective means of deciding expeditiously whether the Fund base should be expanded to cover new services and technologies. U.S. Cellular also advocates treating non-facilities-based providers as assessable for Fund contribution purposes.

As part of its expansion of the contribution base, the Commission should clarify that various enterprise communications services (such as Asynchronous Transfer Mode ("ATM") service and Multiprotocol Label Switching ("MPLS")), as well as one-way Voice over Internet Protocol ("VoIP") service, are subject to contribution obligations.

A key issue before the Commission involves the methodology it should use in determining the level of contributions that must be remitted by carriers providing assessable services. U.S. Cellular favors the continued use of a revenues-based methodology, augmented by certain reforms discussed in the *Further Notice*. Specifically, all revenues from broadband Internet access services should be allocated to the interstate jurisdiction, and the Commission should es-

tablish “safe harbors”—instead of a “bright-line” test—to allocate the portion of revenues from bundled service offerings that will be subject to a contribution obligation, because such an approach would enable contributors to ensure that their obligation would be limited to revenues they receive from their provision of assessable telecommunications.

U.S. Cellular also addresses several Commission proposals for improving the administration of the USF contribution system, and advocates that the Commission should establish an annual notice-and-comment process to enable interested parties to express their views regarding steps that should be taken in revising the Commission’s contribution reporting mechanisms. The Commission also should require the Universal Service Administrative Company (“USAC”) to develop an updated audit plan that reflects the Commission’s contribution reforms, since such a plan would help to ensure the fair operation of the new contribution system.

The Commission also should revise its carrier registration rules, so that the rules apply to both carriers and non-carrier telecommunications providers, thus enabling the Commission to monitor all service providers to ensure compliance with applicable contribution requirements. U.S. Cellular also suggests that the Commission should extend the period during which carriers may make prior period adjustments, because this would be an effective step in minimizing volatility in the fluctuations of the Commission’s quarterly contribution factors.

U.S. Cellular urges the Commission to be cautious in considering modifications to its current rules applicable to contributors’ recovery of Fund assessments from their end-user customers. There is no convincing evidence that customers are being harmed by the existing rules, especially since these rules bar contributors from passing through to their end-user customers amounts in excess of the actual level of the contributors’ federal USF obligations. The Commis-

¹⁰ 47 U.S.C. § 254(d).

sion also should not adopt any rule prohibiting carriers from using line-item charges on customers' bills as a mechanism for recouping their Fund contributions.

II. THE COMMISSION SHOULD TAKE REASONABLE AND EFFECTIVE STEPS TO EXPAND THE USF CONTRIBUTION BASE.

The entire objective of universal service is to ensure that consumers living in rural and high-cost areas have access to modern telecommunications and information services.¹¹ It is axiomatic that everyone benefits from a network that connects everyone, and accordingly everyone should contribute to that greater good. Urban people benefit when they place calls to rural areas, and they benefit when they travel to rural areas and expect their mobile devices to place calls, and access email and the Internet. Accordingly, subsidies must come from all users, with limited exceptions, for example, low-income citizens.

U.S. Cellular finds it wholly inequitable that wireless consumers continue to fund the lion's share of the universal service mechanism (in excess of \$3 billion by most estimates) despite the fact that recent CAF reforms adopted by the Commission have cut support to wireless consumers by roughly \$1 billion per year. The Commission's own Technological Advisory Council ("TAC") expects that, by 2018, only approximately 8% of residential households will be subscribers to landline telephone service.¹²

The shift to wireless continues to accelerate and it is having dramatic effects on our economy, how we communicate, and how carriers charge for services. For example, just last month, Verizon Wireless announced that it would begin giving customers the option to select a

¹¹ See 47 U.S.C. § 254.

¹² FCC, Technology Advisory Council, *Status of Recommendations* (June 29, 2011) at 12 (unpaginated), Chart, "US Facilities Based Service Provider (Residential Access)."

plan that charges an access fee and a fee for data usage.¹³ That is, a customer need not purchase a stand-alone voice plan. Consumers would be free to use Vonage, Skype, or other services such as Apple's Facetime applications to communicate via voice. AT&T Wireless has announced that it would likely follow suit in short order.¹⁴ U.S. Cellular expects wireline telephone companies to do so as well. Consumers will increasingly demand broadband, accessing voice as a broadband application, and find little use for the POTS network.

U.S. Cellular believes virtually every wireless carrier that rolls out a 4G network will soon offer a similar plan, because stand-alone voice service through the public switched telephone network is not going to be a significant part of the 4G architecture. As the Commission's Broadband Plan acknowledged, consumers need access to broadband and mobility in order to enable the country to remain competitive in the 21st Century.¹⁵

¹³ See *Verizon Wireless Unveils Shared Data Plans; Rivals May Follow*, REUTERS, June 12, 2012, accessed at <http://www.reuters.com/article/2012/06/12/verizonwireless-pricing-idUSL1E8HB3AC20120612>. These plans allow a customer to purchase a block of monthly data, which he or she would be free to use across any number of devices connected to the network. *Id.* Rather than requiring a stand-alone voice plan, Verizon's new "Share Everything" plan "will include unlimited voice minutes, unlimited text, video and picture messaging and a single data allowance for up to 10 Verizon devices." P. Goldstein, *Verizon's McAdam Defends Concept Behind Shared Data Plans*, FIERCEWIRELESS, June 21, 2012, accessed at http://www.fiercewireless.com/story/verizons-mcadam-defends-concept-behind-shared-data-plans/2012-06-21?utm_medium=nl&utm_source=internal.

¹⁴ Randall Stephenson, AT&T's Chief Executive Officer, has expressed the view that Verizon's "Share Everything Plan" illustrates the fact that the wireless world is trending toward data-only plans. Stephenson recently stated: "Think about what the pricing approach that [Verizon Wireless] put in place looks like. The value is in the data and the voice and texting has been commoditized." P. Goldstein, *AT&T's Stephenson: Verizon's Shared Data Pricing 'Not a Surprise'*, FIERCEWIRELESS, June 12, 2012, accessed at http://www.fiercewireless.com/story/atts-stephenson-verizons-shared-data-pricing-not-surprise/2012-06-12?utm_medium=nl&utm_source=internal (internal quotation marks omitted). AT&T has indicated that it will launch multi-device data plans, but it has not yet outlined specific pricing. *Id.* See Mikey Campbell, *AT&T CEO Says Data-Only Subscriptions "Inevitable" for Wireless Networks*, APPLE INSIDER, June 1, 2012, accessed at http://www.appleinsider.com/articles/12/06/01/att_ceo_says_data_only_subscriptions_inevitable_for_wireless_networks.html.

¹⁵ The Broadband Plan observes that "[f]urther investment and innovation in U.S. broadband networks will provide U.S. businesses and consumers with the infrastructure they need to continue to compete in the rapidly changing [global] ICT [information and communications technology] market. Omnibus

As consumers begin to choose these all-data plans, U.S. Cellular expects carriers to treat 100% of such revenue as a Title I information service, exempt from universal service contributions. It is unclear how the monthly access fee will be treated. If a consumer does not purchase an interconnected VoIP service separately, and makes voice calls using a free application, then perhaps all of the revenue generated by that device will not be assessable for USF purposes.

This new phenomenon will gut the current revenue base, raising the contribution factor significantly. For example, if half of the interstate telecommunications service revenue disappears, the contribution factor will need to double to raise the same revenue, presumably to 30% or more.

The situation could not be clearer: The current contribution methodology, which is limited to drawing from interstate and international revenues, cannot survive in an all-IP world. The Commission must immediately adopt reforms to expand the contribution base to ensure that all users of our Nation's mobile and broadband networks contribute to ensuring that rural consumers have access. That is what Congress mandated in the Telecommunications Act of 1996.

Broadband Initiative, FCC, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN (Mar. 16, 2010) ("Broadband Plan"), at 59. The Broadband Plan also highlighted the transformative effect of mobile broadband on American business and society:

To see how broadband is transforming American life, walk down a busy street or pay a visit to any school, business or airport. Parents on business trips use their smartphones to check e-mail or watch short videos of their children playing soccer, hundreds, if not thousands, of miles away. . . . Sales and field maintenance personnel use mobile devices to access inventory information in their businesses, place orders and update records, increasing efficiency and productivity. . . . People are using broadband in ways they could not imagine even a few years ago.

Id. at 15. See *Accelerating Broadband Infrastructure Deployment*, Exec. Order No. —, June 14, 2012, accessed at <http://www.whitehouse.gov/the-press-office/2012/06/14/executive-order-accelerating-broadband-infrastructure-deployment#.T9pLj6qdJqk>.email (noting that "[b]roadband access is essential to the Nation's global competitiveness in the 21st century, driving job creation, promoting innovation, and expanding markets for American businesses").

Reform thus begins by broadening the contribution base to pick up revenues that are shifting out of the current mechanism. Action is long overdue, and while this Commission has moved CAF reform with alacrity compared to prior Commissions, this matter cannot wait for the contribution factor to double. It is simply inequitable for U.S. Cellular's customers to pay in an increasing share, while getting less in return, as U.S. Cellular is forced to cut back investments commensurate with the phase-down of legacy Fund support.¹⁶

A. The Commission's Permissive Authority Provides an Effective Mechanism for Designating Various Classes of Telecommunications Providers as Being Subject to Contribution Obligations.

Section 254(d) of the Act provides the Commission with "permissive" authority to require that USF contributions must be made by "any . . . provider of interstate telecommunications"¹⁷

U.S. Cellular agrees with the Commission that the "provision" of telecommunications should be given a broader meaning than the "offering" of telecommunications, and that this

¹⁶ These cutbacks in investment will come during a time when increased levels of investment are needed to bring mobile broadband networks to unserved areas throughout the country. For example, according to a recent study:

[T]he final 1–2% of the population will require vast quantities of area coverage [by mobile broadband networks at 3G or above]. In particular, the last 1% of the US population lies within approximately 1,880,000 square miles of the US land mass. Although some of this area will be entirely unpopulated, a significant proportion will still require network deployment in order to achieve coverage of this last 1%. . . . Covering a significant proportion of this remaining area will require even greater investment than that of the previous five years, which will present a significant challenge. There are several options that could help overcome this challenge, such as funding through mechanisms such as the Connect America Fund

Michael Kende & Matthew Starling, Analysys Mason Ltd., *Rural Mobile Services Deployment in the US: The Challenges in an International Context* 2 (May 2012), accessed at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/52312mason.pdf>.

¹⁷ 47 U.S.C. § 254(d), *quoted in Further Notice* at para. 31.

meaning should be considered from the provider’s point of view (*i.e.*, from the “supply side”).¹⁸ Thus, a carrier or other entity should be treated as providing telecommunications, for purposes of the Commission’s exercise of its permissive authority pursuant to Section 254(d), if the carrier or other entity furnishes or supplies components of a telecommunications service. Giving this broader meaning to the term “provider,” as it is used in Section 254(d),¹⁹ is a reasonable interpretation of Congress’s intent.

The Commission asks whether marketplace changes over the last decade should prompt the Commission to revisit its interpretation of what it means to “provide” or to be a “provider of” telecommunications.²⁰ In U.S. Cellular’s view, marketplace factors should not be given any significant weight in determining the reasonableness and durability of the Commission’s interpretation of congressional intent. As the Commission explained in the *2006 Contribution Methodology Order*, “provide” is generally defined “to mean ‘[t]o make, procure, or furnish for future use, prepare. To supply; to afford; to contribute.’”²¹ If, therefore, a carrier or other entity “provides” a component of a telecommunications service—such as transmission—it should be treated as a provider of telecommunications for purposes of Section 254(d). Marketplace changes should not be deemed to have transmuted this provision of telecommunications into something else.

Section 254(d) qualifies the Commission’s permissive authority by indicating that providers of interstate telecommunications may be required by the Commission to contribute to USF

¹⁸ *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7539 (para. 40) (2006) (“*2006 Contribution Methodology Order*”), cited in *Further Notice* at para. 33.

¹⁹ Section 254(d) states that “provider[s] of interstate telecommunications may be required to contribute to the preservation and advancement of universal service” 47 U.S.C. § 254(d).

²⁰ *Further Notice* at para. 33.

“if the public interest so requires.”²² In deciding whether and to what extent it should exercise its permissive authority pursuant to Section 254(d), the Commission’s policy should be that the public interest will be served by expanding as much as possible the range of telecommunications providers that are made subject to contribution requirements. At least two considerations support this approach.

First, using its permissive authority to increase as much as possible the types of telecommunications providers that are subject to the contribution requirement promotes the Commission’s goal of fairness. As a general matter, many telecommunications providers that do not currently face a contribution obligation nonetheless benefit from the Commission’s universal service policies and programs because these policies and programs tend to increase demand for communications services for which these providers are furnishing components.

In addition, these telecommunications providers may supply components that are “part of a service that competes with or is used by consumers or businesses in lieu of telecommunications services that are subject to [USF] assessment”²³ In such circumstances, a policy geared toward expanding as much as possible the range of telecommunications providers that are made subject to Fund assessments would serve to promote a greater degree of competition in telecommunications markets.²⁴ Ensuring to the extent practicable that all entities are included in the con-

²¹ 2006 Contribution Methodology Order, 21 FCC Rcd at 7539 (para. 40) (quoting *Black’s Law Dictionary* 1244 (6th ed. 1990)).

²² 47 U.S.C. § 254(d).

²³ *Further Notice* at para. 35.

²⁴ See U.S. Cellular Reply Comments, WC Docket No. 10-90, et al., filed Sept. 6, 2011, App. A, Lee L. Selwyn, Helen E. Golding & Colin B. Weir, Economics and Technology, Inc., *The Price Cap LECs’ “Broadband Connectivity Plan”: Protecting Their Past, Hijacking the Nation’s Future*, at 4 (footnote omitted) (explaining that “[e]conomic choices made by consumers and producers are generally most efficient when the factors influencing them are subject to competitive market conditions. . . . [A]n efficient . . . contribution structure will be designed so as to minimally distort such free market choices.”).

tribution base if they provide telecommunications and also those that benefit from telecommunications and broadband service deployments that are enhanced by universal service support, and ensuring that all competitors are equally subject to assessment requirements, will further the Commission's proposed goal of ensuring fairness and competitive neutrality in the contribution system.²⁵ There is no better example of this than Internet service providers who stand to gain greatly from the Commission's repurposing of USF funds to support the deployment of broadband in currently unserved areas.

And, *second*, a policy that seeks to expand the classes of telecommunications providers that must contribute to USF will provide sufficient and predictable support to provide services to consumers, as required by Section 254. U.S. Cellular has argued that “[t]he Commission’s approach . . . should be to determine . . . the size of the broadband fund necessary to accomplish [statutory] goals, and then to devise the means that fairly and effectively generate contributions to the fund sufficient to meet these goals.”²⁶ An effective way to promote both the sufficiency and sustainability of the Fund is for the Commission to utilize its permissive authority to make a broader number of telecommunications providers subject to assessments.

The Commission highlights a serious problem currently facing its universal service program by indicating that “[u]niversal service goals could be undermined by declines in the contri-

²⁵ *Further Notice* at para. 24. U.S. Cellular notes here that although the term “competitive neutrality” is a core principle adopted by the Commission in 1997, it bore almost no mention in the *CAF Order*. It remains critical that the Commission ensure competitive neutrality for all of its universal service rules, otherwise rural citizens will be forced into services of the Commission’s choosing, not their own.

²⁶ U.S. Cellular Comments, GN Docket No. 09-47, *et al.*, filed Dec. 7, 2009, at 17. *See* U.S. Cellular Comments, WC Docket No. 10-90, *et al.*, filed July 12, 2010, at 6 n.13 (noting “that effective universal service reform must extend to reforming the methodology pursuant to which consumers contribute to the fund. With interstate and international revenues continuing to fall, reform that spreads the contribution burden across all users of the networks that will benefit by USF investments must be undertaken so that the NBP goals can be achieved.”).

bution base. Such declines could result in the obligation to support universal service being borne by a shrinking pool of contributors and, ultimately, consumers.”²⁷ This problem is likely to persist and become worse if the Commission does not act to expand the pool of contributors.

B. The Commission Should Adopt a General Definition Governing Which Providers of Interstate Telecommunications Must Contribute to USF.

In the following sections, U.S. Cellular demonstrates that using a general definition to determine whether new services and technologies are assessable would facilitate timely expansion of the contribution base. U.S. Cellular also advocates that non-facilities-based service providers should be subject to Fund contribution obligations.

1. A Broad Definitional Approach Has Numerous Advantages.

The Commission seeks comment on two alternative approaches for determining the types of service providers that must contribute to the Fund, noting that “[t]he question of who should contribute is at the core of much of the uncertainty and competitive distortions that plague the system today.”²⁸

Under the first approach, the Commission would use its permissive authority (and possibly other tools, such as forbearance) to address outstanding contribution issues, and to clarify or modify, on a service-by-service basis, whether particular services or providers will be required to contribute to USF.²⁹ Under the second approach, the Commission would adopt “a more general definition of contributing interstate telecommunications providers that could be more future

²⁷ *Further Notice* at para. 25.

²⁸ *Id.* at para. 28.

²⁹ *Id.* at para. 29.

proof as the marketplace continues to evolve.”³⁰ For the reasons discussed in this section, U.S. Cellular favors the second approach.

Pursuant to the definitional approach, the Commission would exercise its permissive authority to adopt a rule that could read as follows:

*Any interstate information service or interstate telecommunications is assessable if the provider also provides the transmission (wired or wireless), directly or indirectly through an affiliate, to end users.*³¹

The Commission explains that the linchpin of this proposed rule is its clarification that contribution obligations will apply “only [to] entities that provide transmission to their users”³²

In U.S. Cellular’s view, the Commission’s proposed definitional approach has a critical advantage over a case-by-case method for expanding the contribution base: It would enable the Commission to act more quickly in deciding whether a new type of service or technology will be treated as assessable. This advantage has important implications in light of the sweeping and, in many respects, ill-considered changes the Commission has already adopted with respect to the distribution of USF support.

While continuing to relegate USF contribution reform to the back burner last year, the Commission acted in the *CAF Order* to transform Fund distribution mechanisms in a manner that will systematically drain funding away from mobile wireless ETCs. To take one example:

CAF Phase II targets \$400 million annually for mobile broadband providers, compared to \$3.8 billion in annual support for price cap and rate-of-return carriers. . . . \$2 billion of the \$3.8 billion will be received by rate-of-return carriers. Thus, rate-of-return carriers are slated by the Commission to receive five times as much funding as mobile broadband providers. The Commission has chosen these disbursement allocations even though President Obama has established a goal of

³⁰ *Id.*

³¹ *Id.* at para. 75.

³² *Id.* at para. 76.

achieving virtually ubiquitous wireless broadband coverage, line counts for rural incumbent rate-of-return carriers are shrinking significantly, and consumer preferences for mobile voice and broadband services continue to increase.³³

Other parties have pointed to the fact that the Commission's CAF and Mobility Fund budget decisions will threaten to undercut the ability of mobile wireless ETCs to bring advanced broadband services to rural America. RCA, for example, has criticized the Commission for "impos[ing] artificial and unjustified limits on the amount of funding available to wireless carriers . . . notwithstanding business and residential consumers' demonstrated preference for increasingly fast mobile wireless services."³⁴

NASUCA also has been a forceful voice in disputing the Commission's USF budget decisions and the agency's questionable assumptions regarding the funding for broadband deployment. It points out that, "as a general proposition, the Commission assumes that it can use auctions to solve the broadband deployment problem using the existing \$4.5 billion budget, which is based on an assessment on telecommunications services alone"³⁵ NASUCA challenges any claim that this annual budget could be sufficient to bridge the broadband gap, and concludes that the Commission should increase the USF contribution base to include broadband services.³⁶

Another example involves the Commission's ill-considered rules for determining areas that are eligible for Mobility Fund support. U.S. Cellular knows from its broad experience in rural America that the continuing problem remains "some service in some areas." In many rural

³³ U.S. Cellular CAF Comments at 52 (emphasis in original) (footnotes omitted).

³⁴ RCA—The Competitive Carriers Association ("RCA") Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012, at 2-3, *quoted in* U.S. Cellular CAF Reply Comments at 11.

³⁵ National Association of State Utility Consumer Advocates, Maine Office of the Public Advocate, New Jersey Division of Rate Counsel, and Utility Reform Network (collectively, "NASUCA") Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012, at 66, *quoted in* U.S. Cellular CAF Reply Comments at 11.

³⁶ *Id.* at 23.

areas, carriers cannot afford to build cell site density that delivers high-quality coverage that is reasonably comparable to that available in urban areas. U.S. Cellular has spoken of this problem in prior comments,³⁷ and it is notable that many areas where U.S. Cellular knows service to be sub-standard are shown as covered in the Commission’s CAF Phase I mapping tool.³⁸ The budgetary constraints imposed by the Commission in the *CAF Order* have thus “trickled down” to decisions and policies that bar Mobility Fund support in areas with sub-standard service.

Expanding the contribution base in the near term, and adopting mechanisms to facilitate including new services and technologies in the contribution base on a going-forward basis, would provide the Commission with the opportunity to rectify its unwarranted budgetary constraints, by increasing the level of assessments. U.S. Cellular therefore endorses the Commission’s proposal to expand the contribution base to include broadband Internet access service,³⁹ since it would be an effective means of enhancing the sufficiency and sustainability of the Fund as well as reducing the contribution burdens of existing contributors and their end-user customers. Using a definitional approach on a going-forward basis as a means of deciding whether to make revenues from new services and technologies assessable would serve as another effective mechanism for achieving these same results.

In contrasting the case-by-case and definitional options for making decisions concerning expansion of the contribution base, it becomes evident that the former approach is flawed be-

³⁷ See U.S. Cellular CAF Comments at 26 (citation omitted) (explaining that “[t]he Commission itself acknowledges that a disadvantage of the centroid method is its propensity to incorrectly treat large census blocks in low-density rural areas as ‘served’ even though large portions of the blocks are not receiving a level of mobile broadband service that is reasonably comparable to that which is available in urban areas, which is the statutory principle the Commission is required to pursue”).

³⁸ This problem results from the Commission’s conclusion that a census block is covered if the “centroid” point in the census block has coverage, irrespective of whether there is service in any other part of the census block.

cause it would force the Commission to act in *de novo* fashion through its notice-and-comment processes each time it must address the issue of whether a particular service or technology should be subject to contribution obligations.

The delay and uncertainty inherent in such a scheme would harm consumers and competition. Competition would be harmed in those cases in which new services or technologies that are competing with assessable services or technologies remain free from any assessment obligation while the Commission embarks on a protracted rulemaking proceeding to examine whether the new service or technology should be brought within the contribution base. As we have seen over the past decade as the Commission has struggled with contribution reform, the longer the delay, the more severe the impact on competitors already required to contribute to USF.

Moreover, delays in expanding the contribution base could threaten the sufficiency of the Fund, thus risking the impairment or failure of the Commission's efforts to facilitate the deployment of advanced broadband services throughout rural and high-cost areas. The Commission's statutory mandate to ensure that consumers in these areas have affordable access to services comparable to those available in urban areas brings with it a duty to manage the assessment side of the USF equation in a manner that enables a stable flow of contributions that are sufficient to drive broadband deployment.

In addition, all customers of assessable services would be harmed by the case-by-case approach because, in the likely event that this approach would slow the process of Commission action to make new services or technologies subject to a contribution obligation, customers of services that are already assessable would be denied the relief provided by an expansion of the contribution base.

³⁹ See Section II.C.1., *infra*.

The case-by-case approach would likely require the Commission to initiate a rulemaking proceeding for purposes of deciding whether a new service or technology should be assessable. The rulemakings could take years to complete.⁴⁰ Many of these new services may be completely deregulated, which would further complicate the Commission’s task of monitoring the emergence and offering of these services and would also add to the lag time in the Commission’s determining whether the services should be added to the list of assessable services. In the meantime, the sufficiency of the USF—and the provision of broadband services to rural consumers—would be at risk because of the inability to act quickly to expand the contribution base, and customers receiving assessable services would continue to bear payment burdens that could be reduced through an expansion of the contribution base.

One need look no further than the current system—which utilizes a case-by-case approach—to understand the seriousness of this risk. As XO Communications has explained, “[t]he problem with the current USF contribution system is . . . that growth of assessable revenues has not kept pace with the increasing need for USF funding.”⁴¹ This mismatch between assessments

⁴⁰ For example, it took the Commission nearly two years to complete a rulemaking involving whether to make interconnected VoIP service assessable. See *Universal Service Contribution Methodology et al.*, WC Docket No. 06-122 *et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7525 (para. 13) (2006).

⁴¹ Ex Parte Letter from Brad E. Mutschelknaus, Counsel to XO Communications, LLC (“XO Communications”), *et al.*, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.*, filed Sept. 17, 2010 (“XO Communications Sept. 17, 2010, Ex Parte Letter”), at 5. XO Communications explained that:

[W]hile the demand for USF funds increased from \$5.97 billion in 2004 to a total projected demand of \$8.4 billion in 2010 (a 39.7% increase), assessable interstate and international telecommunications revenue actually decreased from approximately \$80 billion to a projected total of only approximately \$69 billion during the same timeframe (a 16% decrease).

Id.

and funding needs could have been mitigated if the Commission had a mechanism in place to facilitate efficient and expeditious expansion of the contribution base.

The definitional approach would provide such a mechanism, in two important respects. *First*, in stating that an information service or telecommunications would be assessable if it also provides transmission to an end user, the definitional approach goes perhaps as far as possible in establishing a bright-line test for the contribution obligation.⁴² As the Commission explains, “[t]he rule is intended to include entities that provide transmission capability to their users, . . . but not to include entities that require their users to ‘bring their own’ transmission capability in order to use a service.”⁴³

In making clear that the contribution obligation turns on who provides transmission, the Commission’s rule would not only provide instructive guidance to potential contributors regarding their contribution obligation, but would also facilitate efficient decision-making by the Commission in its review of whether to impose such an obligation on a new service or technology.

And, *second*, utilization of a definitional approach would eliminate any need for a rule-making proceeding before the Commission could act to expand the contribution base. It would serve as a step “to minimize opportunities for arbitrage as new products and services are developed, so that there is no need to continuously update regulations to catch up with changes in the market.”⁴⁴ The definitional rule would serve as the basis for determining whether a new service

⁴² The Commission notes, however, that, under the definitional approach, it “still [would] be required to determine whether services involved the provision of interstate ‘telecommunications.’” *Further Notice* at para. 88.

⁴³ *Further Notice* at para. 76 (footnote omitted).

⁴⁴ *Id.* at para. 78 (footnote omitted) (citing Broadband Plan at 149).

or technology should be assessable, and would provide the Commission with flexibility regarding the procedural avenues to follow in making this determination.

A “future proof” general definition of contributing interstate telecommunications providers would free the Commission from having to return to the rulemaking drawing board every time it confronts the issue of whether to assess a new service or technology. This, in turn, would enable a more expeditious expansion of the contribution base, with attendant benefits for consumers and competition.

2. The Definition of Assessable Providers Should Cover Non-Facilities-Based Providers.

The general definition of assessable providers proposed by the Commission, and discussed in the previous section, would cover providers regardless of whether “they own the physical facility, or hold license to the spectrum, that is used to provide interstate telecommunications.”⁴⁵ The Commission asks for comment on whether non-facilities-based carriers should be excluded from the definition.

If the Commission adopts a general definition, it should not exclude non-facilities-based carriers from the definition. It would be equitable to cover non-facilities-based providers in the definition of assessable providers because it is likely that they would be providing services in competition with carriers that are obligated to make contributions pursuant to the Commission’s rules. In addition, denying an exemption to non-facilities-based carriers would help to protect the sustainability of the Fund. The Commission points out that its contribution methodology has never exempted non-facilities-based providers from the obligation to contribute to USF.⁴⁶ Creat-

⁴⁵ *Id.* at para. 83.

⁴⁶ *Id.*

ing an exemption as part of the Commission’s contribution reforms would thus have the effect of eliminating an existing source of contribution revenues.

In addition, as the Commission observes in the *Further Notice*, “the Act does not . . . distinguish between facilities-based and non-facilities-based telecommunications providers for purposes of contribution obligations.”⁴⁷ In U.S. Cellular’s view, there are no policy or administrative reasons for the Commission to attempt to establish an exemption that could be challenged as cutting against the statutory approach.

C. The Commission Must Resolve Several Key Issues Regardless of Whether It Chooses a General Definitional Approach or a Service-by-Service Approach for Determining Contribution Obligations.

U.S. Cellular favors expansion of the contribution base as a means of securing the sustainability of the Fund and achieving a greater level of fairness in the operation of the contribution system. In the following sections, U.S. Cellular explains that the Commission should act to include broadband Internet access service, certain enterprise communications services, and one-way VoIP service in the contribution base.

1. Broadband Internet Access Service Should Be Assessable.

Under the general definition approach described by the Commission as a means of determining contribution obligations,⁴⁸ broadband Internet access service would be covered by the general definition and therefore would be assessable.⁴⁹ For the reasons discussed in the following

⁴⁷ *Id.*

⁴⁸ *See id.* at paras. 74-94.

⁴⁹ The Commission does ask, however, whether broadband should be excluded from the general definitional approach for determining contribution obligations. *See id.* at paras. 84-85. In U.S. Cellular’s view, as it discusses in this section, broadband Internet access service should be assessable regardless of the approach taken by the Commission to determine contribution obligations.

paragraphs, the Commission should arrive at the same result, even if it chooses to use a service-by-service approach to determining assessments.⁵⁰

U.S. Cellular favors assessing all forms of broadband (*e.g.*, over cable, satellite, wireline telephone networks, fixed and mobile wireless networks, and power-line networks), and agrees with the straightforward proposition articulated by the State Members of the Universal Service Joint Board:

[B]roadband and services closely associated with the delivery of broadband should make a contribution. This change is essential if universal service funds are going to be used to build broadband facilities. Broadening the contribution base matches well with a broadening of the distribution purposes of the fund to include the total network deemed essential for universal service in the future.⁵¹

The Commission, of course, has chosen to utilize universal service funds to support the deployment and operation of broadband networks.⁵² As a general matter, U.S. Cellular favors a policy that provides that, to the extent that the Commission makes USF funding available to support broadband services, these broadband services also should be subject to a contribution requirement. U.S. Cellular therefore agrees with the State Members' suggestion that the contribution

⁵⁰ The Commission seeks comment on whether, under a service-by-service approach to determining contribution obligations, it should exercise its permissive authority to assess providers of broadband Internet access services. *Id.* at para. 67.

⁵¹ State Members of Universal Service Joint Board Comments, WC Docket No. 10-90 *et al.*, filed May 2, 2011 ("State Members Comments"), at 119, *cited in Further Notice* at para. 65 n.178. *See* Robert Haga *et al.*, "The Omaha Plan: A White Paper to the State Members of the Federal-State Joint Board on Universal Service," (Feb. 2011) at 20 (arguing that "[t]he fact that broadband services are unregulated and may ultimately continue to be classified as information services while at the same time qualifying for USF support requires the expansion of the contribution base to include broadband"), *cited in Further Notice* at para. 65 n.178.

⁵² *See CAF Order*, 26 FCC Rcd at 17695 (para. 86) (emphasis added) (providing that "[a]s a condition of receiving federal high-cost universal service support, all ETCs, whether designated by a state commission or the Commission, will be required to offer broadband service in their supported area that meets certain basic performance requirements"); *Further Notice* at para. 68 (noting that the Commission, in the *CAF Order*, "adopted new rules to ensure that robust and affordable voice and broadband, both fixed and mobile, are available to Americans throughout the nation").

base should encompass broadband in order to match the Commission’s decision to broaden “the distribution purposes of the fund”⁵³

The Commission recognized in the Broadband Plan that the current USF contribution regime has become disconnected from the marketplace, explaining that “[t]he revenue base for universal service contributions—telecommunications services—has remained flat over the last decade, even though total revenues reported to the FCC by communications firms grew from \$335 billion in 2000 to more than \$430 billion in 2008. Broadband-related revenues are projected to grow steadily over time.”⁵⁴ To put this into perspective, if only half of the \$430 billion were assessable, current support levels could be increased dramatically—thus accelerating broadband deployment, including mobile wireless broadband, in furtherance of the Nation’s broadband accessibility goals—with a contribution factor that remains at approximately its current level.

In the *Further Notice*, the Commission cites studies estimating the wired broadband Internet access marketplace to be \$40.3 billion in 2012, and the marketplace for wireless data services to be \$89.8 billion in 2012.⁵⁵ The analysis of the State Members of the Universal Service Joint Board, as well as the estimates cited by the Commission in the *Further Notice*, illustrate that including broadband Internet access service in the contribution base would serve the Commission’s proposed goals of fairness and sustainability. There should be a presumption that, by using USF support to aid the deployment and operation of broadband networks, the Commission has a responsibility to require that providers of broadband Internet access service must contribute

⁵³ State Members Comments at 119.

⁵⁴ Broadband Plan at 149 (footnotes omitted).

⁵⁵ *Further Notice* at para. 71 (citing Telecommunications Industry Association, 2012 ICT Market Review and Forecast, 1-12, 4-4 (2012)).

to USF. The goal of fairness would be undercut by a one-way street that sends high-cost funding to broadband providers without requiring them to contribute to the Fund.

In addition, even with the substantial budgetary restrictions imposed on the Fund by the Commission in the *CAF Order*, the Fund would be placed on a much sounder footing by making broadband Internet access service revenues assessable, advancing Congress's desire that support mechanisms be sufficient and predictable. One reason for this is that networks capable of delivering broadband services are expected to grow dramatically in the next several years.

For example, according to Grant Seiffert, President of the Telecommunications Industry Association ("TIA"), "[c]ompanies that support both wired and wireless [broadband] networks are expected to spend nearly 41 percent more in the next four years than in the previous four years."⁵⁶ Seiffert explained that this growth is driven by the fact that "[t]he rapid advance of smart phones, cloud services and video is placing an enormous demand on the network. These devices and services are essential for consumers and have become critical for businesses."⁵⁷ TIA projects that "U.S. spending on wireless and wired network infrastructure will grow to \$296 billion by 2015."⁵⁸ The demand cited by Seiffert, coupled with the significant expansion of broadband networks, will generate growing levels of broadband Internet access service revenues. Accessing these revenues by making broadband Internet access service assessable would unquestionably enhance the sustainability of the Fund.

⁵⁶ TIA, "TIA ICT Market Review & Forecast Says Smartphones, Tablets and the Cloud Will Drive U.S. Network Infrastructure Spending to \$300 Billion by 2015," Apr. 15, 2012, accessed at <http://www.tiaonline.org/news-media/press-releases/tia-ict-market-review-forecast-says-smartphones-tablets-and-cloud-will>.

⁵⁷ *Id.*

⁵⁸ *Id.*

The Commission also seeks comment on “the overall effect on broadband deployment of assessing or not assessing broadband[,]”⁵⁹ noting that several parties “have expressed concern that assessing broadband Internet access could discourage broadband adoption.”⁶⁰ In evaluating these concerns, it should be kept in mind that the opportunity for consumers to adopt broadband in rural and high-cost areas would be enhanced if broadband Internet access service is made assessable by the Commission. Generating an influx of contributions—instead of continuing to be restricted by a flat revenue base—would enable the Commission to better ensure that sufficient funding is available to comply with statutory mandates, to support deployment in rural areas, and to achieve the goal of the ubiquitous availability of broadband service.⁶¹

Although the *Further Notice* focuses on contribution reform, there are synergies between the Commission’s contribution and distribution policies that have important consequences for the pursuit of the Commission’s universal service goals. This prompts U.S. Cellular to observe that the likelihood of increased broadband deployment resulting from the imposition of contribution obligations on broadband Internet access services would be enhanced even further if the Commission heeds the advice of numerous commenters and uses a cost model, rather than a single-winner reverse auction mechanism, for the disbursement of Mobility Fund Phase II support. As U.S. Cellular has explained:

[R]everse auctions are intended to drive down support to the lowest levels possible, risking results that would be detrimental to rural consumers. It makes more sense—and it would better serve rural consumers—to disburse support in a manner that ensures it will be used efficiently, since this avoids the risk that low-bid

⁵⁹ *Further Notice* at para. 68 (footnote omitted).

⁶⁰ *Id.* at para. 67 (footnote omitted).

⁶¹ See, e.g., President Barack Obama, State of the Union Address, Jan. 25, 2011, accessed at http://www.pbs.org/newshour/bb/politics/jan-june11/sotutranscript_01-25.html (calling for the deployment of “the next generation of high-speed wireless coverage to 98 percent of all Americans” within five years).

reverse auction winners will be left with insufficient support to accomplish the Commission's mobile broadband deployment objectives.⁶²

Using a cost model, and capitalizing on an enhanced funding pool as a result of assessing broadband, would enable the Commission to augment mobile wireless carriers' investment to deploy mobile broadband networks throughout rural America, thus helping "to address the broadband availability gap in unserved areas"⁶³

As noted above, some parties suggest that it could be counterproductive for the Commission to make broadband Internet access service assessable because doing so could depress overall broadband adoption levels. Free Press advises that it is "very concerned that due to current consumer price sensitivity for broadband, any assessment on household Internet connections could result in a net loss of broadband adoption, even if USF is supporting broadband in rural areas and low-income households."⁶⁴

Given the strong arguments that making broadband assessable would further the Commission's proposed goals of fairness, sufficiency, and predictability, proponents of excluding broadband from contribution obligations should bear the burden of demonstrating their case that

⁶² U.S. Cellular CAF Comments at 14 (emphasis in original). *See* C Spire Wireless Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012, at 3 (arguing that the deficiencies of a single-winner reverse auction include the fact that they are anti-competitive and they would likely result on high-priced, low-quality service); T-Mobile USA ("T-Mobile") Comments, WC Docket 10-90, *et al.*, filed Jan. 18, 2012 ("T-Mobile CAF Comments") at 5 (contending that reverse auction would be anti-competitive because "the largest carriers do not need additional support and might submit 'low-ball' bids that would not cover their forward-looking costs, or even zero bids, in an effort to deprive smaller rivals of any Mobility Fund support").

⁶³ Broadband Plan at 144. *See* T-Mobile CAF Comments at 3-4 (arguing that a properly constructed cost model could promote competitive neutrality, provide proper investment incentives, and increase competition, and that predictive economic modeling would work effectively in the context of mobile wireless broadband networks).

⁶⁴ Ex Parte Letter from S. Derek Turner, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, filed Aug. 10, 2010, at 2, *cited in Further Notice* at para. 67 n.185.

requiring USF contributions from broadband providers would create the high likelihood that the overall level of broadband adoption would be reduced.⁶⁵

In U.S. Cellular's view, the Commission's universal service budgetary decisions, coupled with its insistence on utilizing single-winner reverse auctions as the disbursement mechanism for Mobility Fund Phase I support, have already erected formidable roadblocks for the deployment of mobile broadband networks in rural and high-cost areas. The prospects for bringing mobile broadband services to these areas in a timely and effective manner would be further jeopardized if the Commission were to close off the utilization of a significant revenue stream to bolster the size and sustainability of the Fund.

As noted above, in evaluating the merits of claims regarding the possible reduction of overall adoption levels, the Commission should take into account the fact that making broadband Internet access service assessable would also enable and promote broadband adoption in rural and high-cost areas, by making USF more sustainable and helping to ensure the sufficiency of funding. The Commission also should consider that, even if a case could be made that there would be a significant correlation between making broadband assessable and end users' decisions to forego subscribing to broadband service, the Commission may have tools to eliminate or reduce this correlation, short of declining to impose USF assessments on broadband providers.

⁶⁵ It is useful to observe that, in an analogous situation, wireless subscription rates have not been negatively affected by the imposition of USF surcharges, even as the level of the contribution factor has increased over time. Average monthly local bills for wireless subscribers have fallen from \$48.16 at the end of 2009 to \$47.00 at the end of 2011. Estimated wireless connections increased from 290,941,191 to 331,594,848 during the same period. CTIA—The Wireless Association,[®] *Annualized Wireless Industry Survey Results – December 1985 to December 2011*, accessed at http://files.ctia.org/pdf/CTIA_Survey_Year_End_2011_Graphics.pdf. Meanwhile, the contribution factor has increased more than 65 percent from the first quarter of 2009 through the second quarter of 2012. See *Statement of FCC Commissioner Ajit Pai on the Proposed Third Quarter 2012 Universal Service Fund Contribution Factor*, FCC News Release, June 11, 2012, accessed at <http://www.fcc.gov/document/pai-statement-proposed-third-quarter-usf-contribution-factor>.

For example, the Commission could use some portion of its USF resources to augment its low-income program as a means of promoting broadband adoption.⁶⁶

Finally, assertions regarding losses in broadband adoption that would result from assessing broadband are necessarily predictive, and cannot be proven with empirical evidence. This suggests that, rather than taking broadband contributions off the table as a prophylactic measure to fend off the risk of adoption losses, it would be more reasonable for the Commission to adopt a broadband contribution obligation, for the reasons that U.S. Cellular has discussed, with a view toward revisiting this approach if there is any accumulation of actual evidence that the contribution obligation is linked to end users' decisions not to adopt broadband. If such evidence materializes, then the Commission could consider remedial actions to the extent necessary or appropriate. Such an approach would avoid unnecessarily discarding a policy—adding broadband to the

⁶⁶ The Commission has already taken a step in this direction by establishing the Broadband Adoption Pilot Program, which will:

us[e] up to \$25 million in savings from other reforms to test and determine how Lifeline can best be used to increase broadband adoption among Lifeline-eligible consumers. Starting this year, the program will solicit applications from broadband providers and will select a number of projects to fund. Lifeline will help reduce the monthly cost of broadband service, but applicants will be expected to help address other challenges to broadband adoption, including the cost of devices and digital literacy.

FCC Reforms, Modernizes Lifeline To Keep Low-Income Americans Connected to Jobs, Family, 911 Services, FCC News Release, Jan. 31, 2012, at 2. More broadly, various other options are available for improving broadband adoption. For example, a National Urban League report issued earlier this year makes numerous recommendations aimed at promoting broadband adoption among African Americans and others. The report concludes that:

The end goal should be to implement steps that facilitate African Americans and others, including businesses, in adopting broadband in ways that achieve two things—first, enhanced job creation in communities hardest hit by joblessness, and second, enhanced ability of African Americans and others who are hit hardest by joblessness to compete for those jobs.

Madura Wijewardena, Chanelle Hardy & Dr. Valerie Wilson, National Urban League Policy Institute, *Connecting the Dots: Linking Broadband Adoption to Job Creation and Job Competitiveness* 6 (Winter 2012), accessed at <https://prodnet.www.neca.org/publicationsdocs/wwpdf/5212twc.pdf>.

contribution base—that would further the proposed goals of fairness and sustainability, based on speculative assertions regarding the possible adverse consequences of the policy.

2. The Commission Should Use Its Permissive Authority To Make Certain Enterprise Communications Services Subject to Contribution Obligations.

The Commission seeks comment on the need to clarify the contribution obligations of various enterprise communications services that include the provision of telecommunications. The Commission indicates that any such clarification would not include making any determination regarding whether those enterprise services should be classified as telecommunication services or information services.⁶⁷

The Commission focuses on standalone ATM service, frame relay (“FR”), gigabit Ethernet service, and other high-capacity special access services, which the Commission indicates have traditionally been used by carriers and enterprise customers for basic data transmission purposes. Standalone ATM and FR services are currently subject to USF contribution obligations.⁶⁸ The Commission also seeks comment regarding whether current generation services—*e.g.*, Dedicated IP, Virtual Private Networks, and Wide Area Networks that are implemented with various protocols such as ATM/FR, MPLS, and Provider Backbone Bridging—should be assessable.⁶⁹

The Commission should clarify the contribution obligations of the various enterprise communications services referenced in the *Further Notice* by indicating that, to the extent that an enterprise communications service includes the provision of telecommunications, it will be made assessable through the exercise of the Commission’s permissive authority. U.S. Cellular suggests

⁶⁷ *Further Notice* at para. 42.

⁶⁸ *Id.* at para. 41.

⁶⁹ *Id.*

that it would be administratively efficient for the Commission to take this step by adopting a general definition that would cover future generations of enterprise communications services “that deliver similar functionality, regardless of technology used”⁷⁰ Such a definitional approach would help to facilitate the continuing sustainability of the Fund by lessening the need for future rulemaking proceedings to determine whether specific enterprise communications services should be subject to contribution obligations.

Treating various enterprise communications services as assessable would likely increase the size of the contribution base, which would have a positive effect on the Commission’s efforts to achieve broadband deployment goals. In addition, the Commission explains in the *Further Notice* that the current lack of clarity with respect to the application of contribution obligations to enterprise communications services is having adverse consequences. In the case of MPLS-enabled services, for example, this uncertain regulatory regime may lead some providers to leverage the lack of clarity and not pay into the Fund, and “[c]ustomers may use this situation to demand that other providers do the same.”⁷¹ The Commission should put an end to such maneuverings by treating enterprise communications services as assessable if they have a telecommunications component.

In addition, the Commission should eliminate the systems integrator exemption. In the past, the Commission has refused to exercise its permissive authority to impose contribution obligations on systems integrators if telecommunications represent less than 5 percent of total revenues derived from systems integration services.⁷² As part of its USF contribution reforms, how-

⁷⁰ *Id.* at para. 44.

⁷¹ *Id.* at para. 42 (quoting BT Americas Inc., Comments, WC Docket No. 06-122, filed June 8, 2009, at 11) (internal quotation marks omitted).

⁷² *Id.* at para. 47.

ever, it would be reasonable for the Commission to require systems integrators to make Fund contributions to the extent they receive telecommunications-related revenues. Doing so would be consistent with the objective of broadening the contribution base in order to ensure that the Fund is sustainable over time.

3. One-Way VoIP Service Should Be Included in the Contribution Base.

The Commission imposed Fund assessment obligations on two-way VoIP service six years ago, and now asks for comment regarding whether “one-way” VoIP service also should be included in the contribution base. Under this approach, the Commission would exercise its permissive authority under Section 254(d) of the Act to provide that all interconnected VoIP services that provide users with the capability to originate calls to the public switched telephone network (“PSTN”), or to terminate calls from the PSTN, would be assessable.

U.S. Cellular supports such an approach, agreeing with parties who have argued that the current exemption for one-way VoIP causes competitive disparities and creates a significant artificial cost advantage for non-assessable one-way VoIP services.⁷³ Such a contribution requirement would further the Commission’s policy of competitive neutrality and also would be consistent with the treatment of one-way VoIP service by the Commission in other contexts. As the Commission explains, it has included both one-way and two-way VoIP services within the inter-carrier compensation framework for VoIP-PSTN traffic.⁷⁴

III. CONTRIBUTIONS SHOULD BE ASSESSED BY USING A REFORMED REVENUES-BASED SYSTEM.

A revenues-based contribution methodology, enhanced by the adoption of certain reforms by the Commission, would work equitably and efficiently in allocating contribution obligations

⁷³ *Id.* at para. 61 (citing XO Communications Sept. 17, 2010, Ex Parte Letter at 5-7).

among service providers and their customers. In the following sections, U.S. Cellular addresses the advantages of a revenues-based system, advocates that revenues from broadband Internet access services should be assigned completely to the interstate jurisdiction, and suggests that the Commission should establish a “safe harbor” test to govern the allocation of revenues generated by bundled services.

A. A Revenues-Based System Would Serve the Commission’s Policies Promoting Fairness and Competition.

Over the many years in which the issue of USF contribution reform has been pending before the Commission, there have been various levels of support for moving away from a revenues-based system for assessing contribution obligations. U.S. Cellular opposes such an approach, concluding that the existing revenues-based system, if it is enhanced by certain reforms the Commission should adopt in this proceeding, would work effectively to promote the Commission’s universal service and broadband deployment policies.

There are several reasons supporting this conclusion. *First*, the revenues-based system is fair to consumers because it imposes assessments on a progressive basis. As a California Public Utilities Commission Staff White Paper has explained, under a revenues-based approach “customers with lower bills pay less [for flowed-through assessments] than customers with higher bills and higher network usage.”⁷⁵ In contrast, “a numbers-based contribution methodology, in

⁷⁴ *Id.* at para. 64.

⁷⁵ Staff White Paper, California Public Utilities Commission, *Universal Service Reform: An Assessment of Potential Challenges and Opportunities* 9 (Mar. 7, 2011) (“California PUC White Paper”), accessed at <http://www.cpuc.ca.gov/NR/rdonlyres/10E90906-3326-49D4-AC4C-4785F3239A1C/0/USFReformWhitePaperFINAL.pdf>. See Ex Parte Letter from Stefanie A. Brand, Director, Division of Rate Counsel, State of New Jersey, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.*, filed Aug. 13, 2010, Attach. at 2 (footnote omitted) (explaining that “[t]he current revenue based contribution methodology is . . . equitable because it relies on the total revenues derived from the consumer as [the] basis of assessment. Low-use consumers are assessed a lower amount than are high-use consumers, an outcome consistent with the goal of affordable rates”).

which every customer pays the same USF surcharge per telephone number, is regressive compared to a revenue-based methodology, in which customers who use more revenue-generating services pay a higher surcharge.”⁷⁶

Second, the revenues-based methodology is competitively and technologically neutral. As NTCA has observed, “[r]evenues reflect the balance consumers strike between competitive offerings, old and new technologies, and changes that occur over time.”⁷⁷ U.S. Cellular agrees with NTCA that “assessing revenues is the superior method for determining contributions to the USF.”⁷⁸ NTCA explains that a revenues-based system “is technologically neutral and captures the value that consumers place on competing services without regard to the technology used to deliver the service. It reflects the balance consumers strike between competitive offerings, new and old technologies and the evolution of consumer preference.”⁷⁹

Third, the revenues-based methodology produces equitable, pro-competitive results. The California PUC White Paper, for example, concludes that, “[i]f broadband subsidies are included in the USF and the revenue base is expanded to include broadband revenues, the [revenues-based] methodology would demonstrate proportionality between the industries and services subject to assessment and those eligible for subsidies.”⁸⁰ This harmony produced by a revenues-based system, between each industry’s and service’s contribution obligation and its eligibility for

⁷⁶ California PUC White Paper at 11.

⁷⁷ National Telecommunications Cooperative Association (“NTCA”) Reply Comments, WC Docket No. 05-337, *et al.*, filed Dec. 22, 2008 at 19, *quoted in* XO Communications Sept. 17, 2010, Ex Parte Letter at 4. NTCA also pointed out that “[c]ontributions based on other measures, including numbers and connections, would reflect values at the time of adoption and would require frequent periodic adjustments.” *Id.*

⁷⁸ Ex Parte Letter from Jill Canfield, Senior Regulatory Counsel, NTCA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, *et al.*, filed Oct. 8, 2010, at 1.

⁷⁹ *Id.*

⁸⁰ California PUC White Paper at 9.

Fund support, is an equitable result that promotes competition among different classes of telecommunications and broadband service providers.⁸¹

Other contribution methodology proposals would likely be less effective in producing equitable results. For example, a connections-based approach using speed tiers could be problematic because, as XO Communications has indicated, “there is little correlation between connection speeds and usage of telecommunications services.”⁸² XO Communications expresses concerns that “assessing USF [contribution obligations] based on available bandwidth improperly taxes spare capacity and could lead to poor network management practices.”⁸³

Fourth, continued reliance on a revenues-based system, enhanced by a decision to make broadband assessable, would advance the Commission’s proposed goal of efficiency.⁸⁴ As NTCA has explained, “a revenues-based contributions mechanism can be implemented quickly with little burden to providers or the industry (since billing systems are already designed for revenues-based assessments)”⁸⁵ In contrast, concerns have been expressed that a connections-based methodology, for example, “would impose new costs on both industry and USAC in the

⁸¹ As U.S. Cellular has explained, however, these equities and pro-competitive results that can be garnered by a revenues-based methodology that encompasses broadband Internet access service assessments have been compromised by the Commission’s decision in the *CAF Order* to reduce Fund support available to wireless service providers and their customers. See Sec. II, *supra*.

⁸² XO Communications Sept. 17, 2010, Ex Parte Letter, at 3.

⁸³ *Id.*

⁸⁴ See *Further Notice* at para. 23.

⁸⁵ Ex Parte Letter from Michael R. Romano, Senior Vice President – Policy, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-90, *et al.*, filed Jan. 9, 2012, at 1.

form of new data collection and reporting requirements, necessitating changes to billing and reporting systems.”⁸⁶

And, *fifth*, if the Commission expands the contribution base, as U.S. Cellular advocates in these Comments, a reformed revenues-based methodology would work effectively and any basis for replacing it would evaporate. U.S. Cellular agrees with Free Press that, “[o]f all the options discussed for contribution reform, [making] some modifications to [the] revenues-based assessment [methodology is] the most prudent and in-line with the directives of Section 254 [of the Act].”⁸⁷ As XO Communications has argued, “[t]he problem with the current USF contribution system is not the revenues-based assessment per se; rather, it is that growth of assessable revenues has not kept pace with the increasing need for USF funding.”⁸⁸ Thus, there is little reason to believe that a revenues-based system would not operate effectively and equitably if the Commission acts to expand the contributions base.

B. For USF Contribution Purposes, Revenues from Broadband Internet Access Services Should Be Treated as 100% Interstate.

The Commission asks whether, if it uses its permissive authority “to expand or clarify USF contribution requirements to include . . . broadband Internet access services (both fixed and mobile),” it should find that, for USF contribution purposes, broadband should be reported as 100% interstate.⁸⁹

⁸⁶ *Further Notice* at para. 222 (footnote omitted) (citing XO Communications Sept. 17, 2010, Ex Parte Letter at 4). Similar criticisms have been lodged against a hybrid systems with a numbers component. *See* XO Communications Sept. 17, 2010, Ex Parte Letter at 3.

⁸⁷ Ex Parte Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.*, filed Aug. 10, 2010, at 2.

⁸⁸ XO Communications Sept. 17, 2010, Ex Parte Letter at 5.

⁸⁹ *Further Notice* at para. 133.

There are several reasons that support the Commission’s treatment of broadband revenues as 100% interstate. The Commission is concerned regarding the need to fashion contribution reforms that ensure that the Fund will remain sustainable over time. The continuing decline in the contribution base is posing a threat to the stability of the Fund.⁹⁰

Treating broadband revenue as 100% interstate would help to alleviate these concerns and restore stability to the Fund. Changes in today’s marketplace—principally, the shift in demand toward broadband services that currently are not assessable at all—signal the need for contribution reforms that adapt the Commission’s mechanisms to these new marketplace realities, as a means of protecting and enhancing the Fund’s sustainability. A decision to treat broadband revenues as 100% interstate would further this goal.

In addition, the Commission’s proposed goal of efficiency also would be advanced by a decision that broadband revenues are 100% interstate. Such a decision would eliminate the need for the Commission to craft any test or standards for the jurisdictional allocation of broadband revenues. The development of standards for jurisdictional allocations can be a difficult undertaking, and, in fact, “[t]he Commission has not codified any rules for how contributors should allocate revenues between the interstate and intrastate jurisdictions for contributions purposes”⁹¹ The absence of standards can be problematic because it can lead to carriers’ efforts to minimize their interstate allocations in order to reduce the level of their USF contributions.⁹²

The Commission, as a general matter, proposes to minimize these allocation problems, and to make compliance with and administration of the Fund contribution system more efficient,

⁹⁰ *See id.* at para. 25.

⁹¹ *Id.* at para. 126 (footnote omitted).

⁹² *See id.*

“by developing rules that operate clearly within the evolving structure of the marketplace”⁹³

A rule treating broadband revenues as 100% interstate would advance this goal by avoiding the pitfalls of jurisdictional allocations.

Finally, a rule providing that broadband revenues are 100% interstate for Fund contribution purposes would be consistent with Commission precedent. The Commission, for example, has determined that an access service “which permits Internet Service Providers . . . to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level.”⁹⁴

In addition, in determining that cable modem service is an interstate information service, the Commission explained that, based upon an analysis of the location of the points among which cable modem service communications travel, the service “is properly classified as interstate and it falls under the Commission’s . . . jurisdiction.”⁹⁵ The Commission has reached the same result for a variety of other Internet access services, including wireless broadband Internet access service.⁹⁶ Given the Commission’s finding regarding the interstate nature of broadband Internet access services, the Commission, guided by this precedent, should exercise its discretion to treat broadband revenues as wholly interstate.

⁹³ *Id.* at para. 23.

⁹⁴ *GTE Telephone Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order, 13 FCC Rcd 22467, 22467 (para. 1) (1998).

⁹⁵ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9175 (para. 52) (2001), *remanded but not vacated by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002).

⁹⁶ *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, WT Docket No. 07-53, Declaratory Ruling, 22 FCC Rcd 5901, 5911 (para. 28) (2007).

C. The Commission Should Establish a “Safe Harbor” Test for Allocating Revenues from Bundled Services.

If the Commission decides to continue to use a revenues-based system to determine contribution assessments, then another allocation issue it must confront involves the treatment of revenues generated by bundled services. The Commission notes that “[d]etermining which portion of . . . bundled offerings are subject to contribution to the Fund has been an issue of dispute and complexity.”⁹⁷

The objective should be to adopt a rule that allocates revenues from bundled services in a manner that is transparent and enforceable, and that can be easily administered by the Commission. U.S. Cellular favors the adoption of a “safe harbor” test as a means of effectively meeting these goals. The Commission has proposed such an approach, seeking comment on the following rule:

*If an entity bundles non-assessable services or products . . . with one or more assessable services, it must either [1] treat all revenues for that bundled offering as assessable telecommunications revenues or [2] allocate revenues associated with the bundle consistent with the price it charges for stand-alone offerings of equivalent services or products (with any discounts from bundling assumed to be discounts in non-assessable revenues).*⁹⁸

With one reservation discussed below, U.S. Cellular supports this approach, since it would give contributing carriers the option of ensuring that their contribution obligation is limited to revenues from their provision of assessable telecommunications. The test would be transparent because carriers utilizing the allocation option would be required to base their allocations on their pricing for stand-alone offerings. Since these prices could be readily verified by the Commission, it would be relatively easy for the Commission to enforce the allocation require-

⁹⁷ *Further Notice* at para. 101 (footnote omitted).

⁹⁸ *Id.* at para. 106.

ment to ensure that carriers are properly making revenue allocations between assessable services and non-assessable services or products.

A problematic aspect of the proposed rule, however, is the arbitrary approach it would take regarding the treatment of discounts. While treating all discounts as allocable to non-assessable revenues would ease the Commission’s administration of the rule, it would place an unwarranted burden on carriers (and their customers) by increasing the level of their contribution obligation. A more equitable result would involve a distribution of some portion of discount amounts between assessable services and non-assessable services or products, so that at least a portion of the discounts would be taken into account in determining the level of contribution assessments.

The Commission also explores using a “bright-line” test for revenues from bundled services, asking for comment on a contribution methodology that would assess the full retail revenues of bundled services that contain “telecommunications,” without safe harbors or the ability to present individualized showings.⁹⁹ While U.S. Cellular is sympathetic with the Commission’s concern that “the lack of bright-line rules may encourage providers to minimize their allocation of revenues in a bundle to assessable services to reduce their contribution obligations in order to gain a competitive edge[.]”¹⁰⁰ U.S. Cellular cannot support a bright-line test.

The Act states that providers of interstate telecommunications services must contribute to the Fund, and that the Commission also may require providers of interstate telecommunications to contribute.¹⁰¹ A bright-line test that requires contributions based on non-assessable revenues

⁹⁹ *Id.* at para. 113.

¹⁰⁰ *Id.* at para. 105.

¹⁰¹ 47 U.S.C. § 254(d).

would exceed the scope of the Commission’s statutory authority. Moreover, in U.S. Cellular’s view, the safe harbor approach discussed above would provide sufficient safeguards to address the Commission’s concerns regarding incentives to minimize revenue allocations to assessable services.

IV. SEVERAL PROPOSALS PRESENTED BY THE COMMISSION WOULD BE EFFECTIVE IN IMPROVING ADMINISTRATION OF THE USF CONTRIBUTION SYSTEM.

The Commission wisely has proposed that any reform of the contribution system should not overlook problems caused by the rules and procedures governing the administration of the current system. U.S. Cellular suggests that the Commission should focus its attention on several areas where reforms and more effective rules and procedures are needed. Specific proposals are addressed in the following sections.

A. The Commission Should Adopt an Annual Notice-and-Comment Process for Updating Contribution Reporting Mechanisms.

As the Commission acknowledges in the *Public Notice*, the instructions issued annually by the Wireline Competition Bureau (“Bureau”), regarding the requirements and procedures governing the submission of annual and quarterly Telecommunications Reporting Worksheets (“Worksheets”), are a less than perfect means of providing filing parties with assistance in complying with the Commission’s revenue reporting and USF contribution requirements.

This is so because “[t]he Commission has not . . . adopted those instructions pursuant to the rulemaking provisions of the Administrative Procedure Act.”¹⁰² Since the status of the instructions—whether they constitute binding rules or non-binding agency guidance—is not clear,

¹⁰² *Further Notice* at para. 345 (footnote omitted).

the instructions can result in confusion and uncertainty, rather than serving as a useful tool for parties seeking to comply with the Commission's reporting requirements.

U.S. Cellular endorses the Commission's proposed solution to this problem. Under the Commission's approach, the Bureau would annually issue a Public Notice seeking comment on the Worksheets and the related instructions. The Bureau then would be required to issue the finalized Worksheets and instructions at least 60 days before the annual filing deadline.¹⁰³ Providing parties with an opportunity to comment on proposed revisions to Worksheets and instructions would provide useful input to the Bureau, enabling it to focus on sources of uncertainty and confusion in the instructions identified by commenters. Such input would thus assist the Bureau in simplifying compliance and administration.

At a minimum, if the Commission does not adopt an annual notice-and-comment mechanism, it should at least require the Bureau to seek comment on proposed revisions to the Worksheets and instructions before implementing any significant changes resulting from the reforms discussed in the *Public Notice*.¹⁰⁴ U.S. Cellular also agrees with RICA's observation that "in addition to providing notice and comment, the APA [Administrative Procedure Act] requires that the agency issue a decision that includes discussion of the relevant issues raised in the comments."¹⁰⁵

¹⁰³ *Id.* at para. 346.

¹⁰⁴ *See id.* at para. 349.

¹⁰⁵ Ex Parte Letter from David Cosson, Counsel to Rural Independent Competitive Alliance ("RICA"), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122, *et al.*, filed May 24, 2012, at 1 (expressing support for the Commission's proposal to establish a notice-and-comment process for future revisions of Worksheets and accompanying instructions).

B. USAC Should Be Instructed To Prepare an Updated Audit Plan That Accounts for the Commission’s Contribution Reforms.

U.S. Cellular agrees with the Commission’s observation that “[n]o system is fair when some telecommunications providers play by the rules and others do not[,]”¹⁰⁶ and therefore supports the suggestion that the Commission should require USAC to develop and adopt an updated audit plan reflecting contribution reforms proposed in the *Further Notice* and subsequently adopted by the Commission.¹⁰⁷

Program audits conducted by USAC based on an updated and uniform set of auditing guidelines would be an effective means of policing compliance with the Commission’s requirements and prompting all telecommunications providers subject to these requirements to “play by the rules.” USAC’s objective should be to improve the audit process by increasing the clarity of the standards against which its auditors are reviewing carrier behavior, and increasing the consistency of the compliance standards.¹⁰⁸

C. The Commission Should Take Steps To Better Ensure the Proper Registration of Service Providers That Are Subject to Contribution Obligations.

Under the Commission’s current rules, carriers (and interconnected VoIP providers) must register with the Commission within 30 days after they begin providing service, thus bringing them within the USF contribution system and requiring them to file Form 499 reports.¹⁰⁹ The problem with the current rules, however, is that they do not require all non-common carrier tele-

¹⁰⁶ *Further Notice* at para. 368.

¹⁰⁷ *Id.* at para. 372. The Commission explains that it took this approach in its recent Lifeline and Link Up rulemaking proceeding, requiring USAC to establish an updated audit plan based on reforms adopted in that proceeding. *Id.*

¹⁰⁸ See *Lifeline and Link Up Reform and Modernization Order, et al.*, WC Docket No. 11-42, *et al.*, Report and Order and Further Notice of Proposed Rulemaking, FCC 12-11, 2012 WL 387742 (rel. Feb. 6, 2012), at para. 287 n.795.

¹⁰⁹ See *Further Notice* at para. 381.

communications providers to register with the Commission, even though they may have Form 499-A filing obligations.¹¹⁰

U.S. Cellular supports the Commission's proposal to amend its rules to tighten up its registration requirements. Specifically, the Commission should require every entity required to submit a Worksheet to register with the Commission within 30 days of beginning to provide service.¹¹¹ Such a requirement would assist the Commission in monitoring all providers for compliance with its rules and regulations.

The Commission also should go a step further, by requiring that wholesale telecommunications providers (regardless of whether they are common carriers) must determine if a customer that is required to register with the Commission has in fact done so, prior to providing service to that customer.¹¹² If wholesale providers are required to ascertain whether their prospective customers have registered with the Commission, this would provide an incentive for these providers to withhold service from any resellers that have failed to register with the Commission.¹¹³

U.S. Cellular suggests that, while a wholesale provider should have an affirmative duty to initially check the registration status of a potential customer, it should not have any responsibility to monitor the registration status of that customer on an ongoing basis.¹¹⁴ U.S. Cellular also agrees with the Commission's conclusion in the *Slamming Order* that wholesale carriers required to determine the registration status of prospective reseller customers should not be held responsi-

¹¹⁰ *Id.* at para. 382.

¹¹¹ *See id.* at para. 383.

¹¹² *See id.* at para. 385.

¹¹³ *See Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, CC Docket No. 94-129, Third Report and Order and Second Order on Reconsideration, 15 FCC Rcd 15996, 16027 (para. 66) (2000) ("*Slamming Order*"), cited in *Further Notice* at para. 385 n.609.

ble for the accuracy of registration data supplied by the customers, nor should they be liable for withholding service from a potential customer “relying in good faith on the absence of such registration”¹¹⁵

D. The Commission Should Extend the Period During Which Prior Period Adjustments May Be Made.

The Commission seeks comment on options for modifying the manner in which adjustments are made to the contribution factor, which is currently revised on a quarterly basis and is based on the ratio of total projected quarterly expenses of the USF support mechanisms to total projected collected end-user telecommunications revenues. If the Commission continues to use a contribution factor as part of its contribution system, it asks what steps it could take to reduce volatility in the fluctuations of the quarterly contribution factors, which is caused in part by prior period adjustments made by USAC.¹¹⁶ This volatility creates problems for both consumers and USF contributors.¹¹⁷

U.S. Cellular favors a solution to this problem of volatility that would involve extending the period of time during which such prior period adjustments are taken into account by USAC for subsequent adjustments to the contribution factor. The Commission suggests that prior period

¹¹⁴ See *id.* at 16027 (para. 65).

¹¹⁵ *Id.* at 16027 (para. 66).

¹¹⁶ See *Further Notice* at paras. 351-352. USAC makes the adjustment for the immediately preceding quarter and “the Commission currently adjusts the contribution factor each quarter if USAC collects insufficient funds, or if USAC collects funds in excess of actual expenses in the prior quarter” *Id.* at para. 351.

¹¹⁷ See Ex Parte Letter from David B. Cohen, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-122 *et al.*, filed Mar. 28, 2012, at 6-7:

A more stable USF contribution factor from quarter-to-quarter would reduce consumer frustration and administrative burdens. As it stands, there are often significant swings in the contribution factor throughout the year, which makes it difficult for consumers to budget and requires contributors to make billing and other administrative adjustments on a continuous basis.

adjustments could be leveled out over a period of two subsequent quarters, as a means of reducing fluctuations in the contribution factor caused by prior period adjustments.¹¹⁸ A staff analysis presented by the Commission in the *Further Notice* suggests that this approach could be effective in reducing the amount and severity of the fluctuations in the contribution factor from one period to the next.¹¹⁹

In U.S. Cellular's view, doubling the period for which prior period adjustments are made would have a more positive effect on administration of the Fund than another option discussed by the Commission, *i.e.*, revising the contribution factor on an annual basis, rather than on a quarterly basis.¹²⁰ Such an approach would risk larger swings in the contribution factor than recent fluctuations cited by the Commission,¹²¹ which could complicate administration of the Fund, cause potentially sharp changes in the level of payments made to carriers by end-user customers, adversely affect carrier planning, and work hardships on smaller carriers.

V. THE COMMISSION SHOULD BE CAUTIOUS IN DEVELOPING RULES GOVERNING THE RECOVERY OF USE CONTRIBUTIONS FROM END-USER CUSTOMERS.

As a general matter, U.S. Cellular lauds the Commission's interest in "improv[ing] transparency relating to the amount of universal service contribution charges that are being passed

¹¹⁸ *Further Notice* at para. 356.

¹¹⁹ *Id.* at paras. 357-358 & Chart 8; App. D ("Data Analysis for Prior Period Adjustments").

¹²⁰ *Id.* at para. 353.

¹²¹ The Commission indicates that:

Over the last seven quarters, the contribution factor has been revised both up . . . and down . . . to reflect prior period adjustments to the contribution base. In this period, there was . . . a fluctuation in the contribution factor from a low of 13 percent in one quarter to a high of over 17 percent in another quarter.

Id. at para. 352 (footnote omitted). The Commission also points out, however, that "prior period adjustments are not the only source for fluctuations in the contribution factor from one quarter to the next." *Id.*

through by the carriers to their customers.”¹²² Nonetheless, as discussed in the following sections, U.S. Cellular is concerned that some of the Commission’s proposals may amount to solutions in search of a problem. U.S. Cellular cautions that any consideration by the Commission regarding whether to adjust the current regime governing the recovery of universal service contributions from end-user customers should include a careful examination of whether the adjustments would result in more burdens than benefits.

A. Consumers Are Not Harmed by the Current Mechanisms Utilized by Contributors in Their Recovery of USF Obligations.

The Commission’s current rules permit USF contributors to recover their universal service contributions from their end-user customers. The Commission, however, has specified that any federal USF line-item charge collected by a Fund contributor must not “exceed the interstate telecommunications portion of that customer’s bill times the relevant contribution factor.”¹²³

In the *Further Notice*, the Commission expresses an interest in providing a greater degree of clarity on customers’ bills. The Commission advances a proposal that would limit the flexibility of contributors in their recovery of USF contributions from their customers, and would be intended to “provide greater transparency regarding such recovery to enable consumers to make informed choices regarding their service.”¹²⁴ Specifically, the Commission seeks comment on whether it should adopt a rule that federal USF contributors must identify on their consumer bills the specific portion of the bill amount (whether based on revenues or some other unit) that is subject to USF assessment.¹²⁵

¹²² *Id.* at para. 389.

¹²³ 47 C.F.R. § 54.712(a).

¹²⁴ *Further Notice* at para. 390.

¹²⁵ *Id.*

U.S. Cellular opposes the Commission's proposed rule. The rule clearly would impose burdens on contributors that they do not face under the Commission's current rules, and such burdens would bring unnecessary and unwarranted administrative costs. Costs are typically associated with the redesign of customer bills to include additional or reformatted information. The Commission's proposed requirement would require Fund contributors to make changes in their billing programs and systems, and additional monitoring of customer billings also might be necessary on a going-forward basis.

Further, in U.S. Cellular's view, the imposition of these burdens and costs would not be justified because the Commission has not identified any clear-cut and pressing billing problem that needs to be addressed. As U.S. Cellular has noted, and as the Commission has pointed out in the *Further Notice*,¹²⁶ end-user customers are already protected by the Commission's rules: Fund contributors cannot recoup from their customers more than the contributors are required to pay into the Fund. Any USF contributor violating this prohibition would face the imposition of penalties by the Commission.

Moreover, any customer interested in protecting himself or herself against being overcharged by the miscalculated flow-through of USF contributions has the option of querying the carrier involved to learn how the flow-through charges were derived and to confirm their accuracy. Since the Commission in the *Further Notice* has not pointed to any endemic problem of carriers over-collecting their USF contributions, customers' reliance on making their own inquiries to ensure the accuracy of their billed amounts would seem to be a sufficient mechanism to guard against error or abuse, and would also forego the need to impose the requirements proposed by

¹²⁶ *Id.* at para. 388.

the Commission, which would result in costs to all Fund contributors that ultimately would be borne by all customers of these contributors.

U.S. Cellular also opposes the Commission's suggestion that its rules should provide that a USF contributor's advertised price for its services must include the universal service contribution, while allowing the contributor's continued publication of the USF contribution as a line item in end-users' bills.¹²⁷ It would be difficult to square the Commission's foray into the realm of regulating carriers' advertising with the Commission's commitment to promoting open and unfettered competition in local exchange markets. Such regulation could place Fund contributors at a competitive disadvantage and, to the extent competition is distorted and constrained by Commission regulation, consumers are adversely affected.

Moreover, if the Commission is interested in "making the burden of the universal service contribution plain"¹²⁸ to end-user consumers, there may be options for achieving this objective that avoid harmful impacts on competition. For example, the Commission suggests that it could require that Fund contributors disclose at the time of initial service subscription "the amount of the quoted rate or other assessable units that would be subject to assessment"¹²⁹ In U.S. Cellular's view, such an approach would be less intrusive than subjecting carriers to Commission-mandated advertising requirements, and would be at least equally effective as the imposition of advertising requirements and restrictions. Nonetheless, unless there is a more convincing demonstration that consumers are being disserved by the current regulatory framework, U.S. Cellular

¹²⁷ *Id.* at para. 391.

¹²⁸ *Id.*

¹²⁹ *Id.* at para. 392.

urges the Commission to be cautious in deciding whether to impose such a disclosure requirement at the time of initial service subscription.

The Commission also asks whether, if it chooses to adopt any of its suggested rules to limit carriers' flexibility and promote billing transparency, the rules should apply only in the case of mass market consumers, and not in the case of business customers. U.S. Cellular would favor such an approach because, as the Commission observes, mass market customers "have less leverage than businesses, institutions and governmental entities that purchase communications services"¹³⁰

B. The Commission Should Not Prohibit Carriers from Recovering Contributions Through Line Items on Customers' Bills.

As an alternative to the proposals addressed in the preceding section, the Commission seeks comment on prohibiting Fund contributors from recovering contribution assessments from end users through a line-item or "surcharge" on end-user bills. Under this approach, the Commission explains, contributors still "would retain the flexibility to include the cost of contributing to the universal service fund in determining their overall rate structure"¹³¹

U.S. Cellular opposes this proposed approach. While prohibiting carriers from using line items to recoup contributions might make consumers' bills "simpler,"¹³² such a prohibition would make the bill less informative, by requiring that carriers must withhold from their end-user customers information about the level of their monthly charges that is used to defray the carriers' Commission-imposed USF assessments.

¹³⁰ *Id.* at para. 393.

¹³¹ *Id.* at para. 394.

¹³² *See id.* at para. 395.

As U.S. Cellular discussed in the previous section, the Commission should be reluctant to tread into the domain of competitive carriers' pricing for their services, since regulatory restrictions on carriers' flexibility could have unintended and unforeseen consequences regarding the range of services offered by Fund contributors as well as their ability to compete against non-contributing broadband service providers. This need for caution by the Commission is further underscored, as U.S. Cellular has suggested, by the fact that consumers in fact derive benefits from the information imparted by line-item billing for Fund assessment recoupments.

The Commission notes in the *Public Notice* that "carriers are not permitted to recover interstate TRS costs as part of a specifically identified charge on end users' lines[,]"¹³³ with the implication that this could provide support for taking the same approach with respect to USF assessments. U.S. Cellular suggests, however, that the comparison is inapt.

In the *ADA Second Report and Order*, the Commission explained that MCI Telecommunications Corporation had proposed "a specifically identified charge on end users" for the recoupment of telecommunications relay service costs.¹³⁴ The Commission rejected MCI's proposed approach:

In order to provide universal telephone service to TRS users as mandated by the ADA, carriers are required to recover interstate TRS costs as part of the cost of interstate telephone services and not as a specifically identified charge on end user's lines. Thus, MCI's proposal to assess such a charge is not feasible. Further, the ADA requires interstate costs to be recovered from all subscribers of every interstate service. Therefore, we reject MCI's proposal¹³⁵

¹³³ *Id.* at para. 394 n.617 (citing *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990*, CC Docket No. 90-571, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (1993) ("*ADA Second Report and Order*").

¹³⁴ *ADA Second Report and Order*, 8 FCC Rcd at 1805 (para. 19).

¹³⁵ *Id.* at 1806 (para. 22).

The Commission thus appeared to base its rejection of line-item billing for the recoupment of TRS costs on its conclusion that such an approach was foreclosed by the Americans with Disabilities Act of 1990. The Commission does not face any similar constraints with regard to carriers' recoupment of USF assessments, and, in fact, the Commission's rules currently permit the "recover[y] [of] federal universal service contribution costs through a line item on a customer's bill"¹³⁶

VI. CONCLUSION.

The Commission deserves credit for advancing thoughtful and comprehensive proposals for reforming its rules and mechanisms governing USF contributions. U.S. Cellular encourages the Commission to continue working toward resolution of issues related to the operation of this important component of the universal service system. The Commission should give priority to completing its work because the effective and equitable operation of the USF system will be enhanced by curing deficiencies in the existing contribution mechanism.

The focus of contribution reform should be taking action to expand the base of contributors. For example, it is critically important to treat broadband Internet access service as an assessable service for Fund contribution purposes. Adopting such a requirement, together with taking other steps to broaden the base for contribution revenues, will benefit consumers, will ensure that contribution obligations are shared more equitably than they are today, and will help to improve the sustainability of the Fund.

In addition, U.S. Cellular urges the Commission to retain a revenues-based contribution methodology, instead of attempting to fashion a new system based on numbers, connections, or a

¹³⁶ 47 C.F.R. § 54.712(a).

hybrid design. The Commission also should reform the existing revenues-based system in order to ensure that it operates more efficiently and fairly.

Respectfully submitted,

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